Background

On 3 February 2010 the appellant made a request for information to NAMA in accordance with Article 6 of the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007) (the Regulations). The information requested was:

1. "A breakdown of all assets, loans and properties due to be transferred to the Agency. This should include the value placed on the asset and by whom. It should include the addresses of all assets and properties.
2. A breakdown of all properties and property loans currently owned or controlled by the Agency.
3. Minutes of board meetings relating to the transfer of assets and properties to the Agency. The date range for this request is January 2009 to January 2010, inclusive."

On 16 February 2010 the request was refused by NAMA on the basis that it did not consider itself to be a "public authority" within the meaning of the Regulations. The appellant's subsequent request for an internal review of this decision resulted in a review decision of 19 March 2010 by NAMA in which it affirmed the original decision. On that same date,19 March 2010, in accordance with Article 12(4) of the Regulations, the appellant made an appeal to me as Commissioner for Environmental Information against NAMA's decision.

Article 12 of the Regulations provides for an independent appeals mechanism and establishes the Office of Commissioner for Environmental Information to operate that appeals mechanism. Article 12(3) of the Regulations provides for the right of appeal to the Commissioner by a person whose request for environmental information has been refused. Article 11(5)(a) of the Regulations clarifies that a decision to refuse a request for environmental information, which may be appealed to the Commissioner, includes a request that "*has been refused on the grounds that the body or person concerned contends that the body or person is not a public authority within the meaning of these Regulations* ".

In this present appeal, the decision under review by me is the decision of NAMA that it is not a public authority within the meaning of the Regulations. This appeal is not concerned with whether the information sought by the appellant, in his request of 3 February 2010, constitutes "environmental information" as defined in the Regulations; nor is this appeal concerned with whether, in the event that the information sought is "environmental information", it falls to be made available to the appellant in accordance with the Regulations.

In the course of the conduct of this appeal my Office has had extensive contacts both with NAMA and with the appellant. Both parties to the appeal have made substantial submissions in support of their respective positions. While it is not necessary to set out the content of these submissions in detail in this decision, I can confirm that I have had full regard to these submissions in the course of making my appeal decision. In the course of the appeal also, the relevant Investigator in my Office set out, for the benefit of the parties, her preliminary views on the matters at issue in the appeal. These preliminary views of the Investigator changed as the process progressed. The detailed submissions made by the appellant and by NAMA include responses to the preliminary views set out by my Investigator.

In the course of the appeal, the appellant decided to narrow the scope of the information covered by his request. He did so at the suggestion of my Investigator who, at the time, was hopeful that NAMA might reconsider its position that it is not a public authority (for the purposes of the Regulations). Had this happened, the issues then would have been the substantive issues of whether the information sought constitutes environmental information and, if so, whether it should be made available. My Investigator took the view that narrowing the request, to what self-evidently constituted environmental information, would be likely to simplify the adjudication process. These efforts were made in the context of an attempt to bring the parties to the appeal together with a view to settling the matter, whether in full or in part, by agreement. In the event, these efforts did not succeed. Indeed, NAMA took the view that the appellant had narrowed his request in such a way as to, in effect, have abandoned his original request; it then contended that my Office was acting in an *ultra vires* fashion in proceeding with the appeal.

I am satisfied, in proceeding with this appeal on the issue of whether or not NAMA is a public authority for the purposes of the Regulations, that I am acting in accordance with the powers conferred on me by Article 12 of the Regulations. It would be unconscionable that an appellant, acting in good faith in the context of seeking to settle his case would, when settlement efforts failed, be deprived of his right to an adjudication by the appeals authority.

The Definition of "Public Authority"

The issue for decision in this appeal is whether or not NAMA constitutes a "public authority" for the purposes of the Regulations.

Article 3(1) of the Regulations provides that

"'public authority' means, subject to sub-article (2)-

(a) government or other public administration, including public advisory bodies, at national, regional or local level,

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and

(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),

and includes-

(i) a Minister of the Government,

(ii) the Commissioners of Public Works in Ireland,

(iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),

(iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),

(v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),

(vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,

(vii) a company under the Companies Acts, in which all the shares are held-

(I) by or on behalf of a Minister of the Government,

(II) by directors appointed by a Minister of the Government,

(III) by a board or other body within the meaning of paragraph (vi), or
(IV) by a company to which subparagraphs (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information".

Article 3(2) provides:

"Notwithstanding anything in sub-article (I), 'public authority' does not include any body when acting in a judicial or legislative capacity."

It is clear that NAMA does not act either in a judicial or legislative capacity and, accordingly, that Article 3(2) has no relevance to this case.

While the appellant has made various arguments as to why NAMA should be regarded as a public authority, his fundamental argument is that NAMA is a body captured at item (vi) above in the list of entities which the definition of public authority "includes". For its part, NAMA has made wide-ranging arguments in support of its case that it is not a public authority and, in particular, argues that it is not captured at item (vi) above in the list of entities which the definition of public authority "includes".

Appellant's Position

The appellant's position is that NAMA is a public authority for the purposes of the Regulations by virtue of Article 3(1)(vi) on the basis that it is "*a board or other body (but not including a company under the Companies Acts) established by or under statute* ". The appellant argues that "*[t]here is no need to reference further any other part of the legislation, Article 3(1)(vi) is wholly and entirely sufficient for NAMA to fall under the Regulations, as it is a body established by or under statute.* " In his submission of 4 October 2010, the appellant sets out his argument further:

"The definition in Article 3 of the Regulations is constructed as follows:
"public authority" means X and includes Y
where X represents the three types of public authority 3(1)(a)-(c) and Y is a list of bodies and categories of bodies i.e. 3(1)(i)-(vii). NAMA clearly falls within the definition of 3(1)(vi).

As a matter of plain English and logic, if a body falls within one of the categories 3(1)(i)- (vii) it is a public authority because it is included in the definition. The applicant is at a loss to understand how this Article can be interpreted in any other way."

NAMA's Position

The essence of NAMA's position in relation to Article 3(1)(vi) is that the list of entities [items (i) to (vii)] which the definition of public authority "includes" must be read in conjunction with sub-paragraphs (a) to (c) by which they are qualified. It argues that the use of the term "includes" in an interpretation clause does not always have the effect of enlarging the range of the clause in which it is used; it argues that in some instances the use of the term "includes" in an interpretation clause has a limiting effect. As I understand its position, NAMA argues that in order to qualify as a "public authority" a body or person must first be captured in one or other of the three categories identified at sub-paragraphs (a) to (c) of the definition. It argues that NAMA is not a body or person captured at sub-paragraphs (a) to (c) of the definition and,

therefore, it cannot be regarded as a public authority for the purposes of the Regulations.

In its submission of 17 September 2010, NAMA, having agreed that it is a body "established by or under statute", explains its argument as follows:

> *"The mere fact of being a body established by or under statute does not automatically bring that body within the definition of public authority in the Regulations. The tests provided for in Article 3(1)(a), (b), or (c) of the public authority definition must first be met before applying the secondary test of whether the body in question is one of the classes of body listed in Article 3(1)(i) - (vii). Article 3(1)(a), (b), or (c) require that there is either a government or public administration or public advisory body or a legal entity performing public administrative functions or providing services relating to the environment."*

It reformulated this argument in a subsequent submission on 21 June 2011, saying:

> *"[T]he bodies identified between (i) to (vii) are bodies that might be included within the class of persons identified by subparagraph (a) - (c) but which (most importantly) must also have the properties provided for and required by subparagraph (c). It is for this reason that the use of the word 'includes' in the Regulations must have a limiting rather than an enlarging effect. If an enlarging effect was seriously contended for, it would result in any board established under statute falling within the definition of public authority and that would be to interpret the Regulations without any regard to their intended purpose ."*

Another key element in NAMA's submission is that, in interpreting the provisions of the Regulations, I am obliged to have regard to the provisions of the EU Directive [2003/4/EC] (the Directive) which the Regulations transpose into Irish law. It is NAMA's contention that, having regard to the provisions of the Directive, it is clear that the definition of "public authority" is intended to be more restrictive than that apparently provided for by the Irish Regulations; interpreting the Regulations, in the context of the Directive, would avoid a situation where the definition of "public authority" is extended beyond what is envisaged in the Directive.

Analysis

There is no dispute as to the fact that, as a body established under section 9 of the National Asset Management Agency Act 2009, NAMA is "*a board or other body (but not including a company under the Companies Acts) established by or under statute*". On the face of it, therefore, NAMA is a body captured at item (vi) in the list of entities which the definition of public authority "includes" and, accordingly, would appear to be a public authority for the purposes of the Regulations. The position advocated by NAMA requires one to set aside the ordinary and plain meaning of the word "includes" in favour of an understanding which connotes a limiting rather than an inclusive or extensive meaning.

Essentially, this decision therefore depends on the application of the rules of statutory interpretation. David Dodd in *Statutory Interpretation in Ireland* (Tottel Publishing, 2008) summarises the basic approach in this type of situation:

> *"Starting from the point that the text of the enactment is the pre-eminent indicator of the legislature's intention, two principal rules follow: the ordinary (or literal) meaning rule and the plain meaning rule. The former rule provides that words and phrases should be given their ordinary and natural meaning. The latter rule provides that where that meaning results in a provision being entirely plain and unambiguous, then the interpreter's job is at an end, and effect must be given to that plain meaning.* "

Dodd states also: *"Subject to some exceptions and additional rules, the same general principles of interpretation that apply to primary legislation apply to secondary legislation* ." Furthermore, he explains that the literal or textualist approach to interpretation is also employed with respect to European legislation and notes that "[i]n many cases, the literal and teleological approach will coincide".

The Courts in Ireland have dealt with the meaning of "includes" in several judgments. Murdoch's **Dictionary of Irish Law** states:

> *"The word* include *has been held to be a word of extension when used in a statutory definition: Attorney General (McGrath) v Healy [1972] IR 393. A word in a statute will have its ordinary meaning in addition to that included by the extension where the extension* include *is given in its definition. The word* include *has the function of enlarging the meaning of the words or phrase with which it is associated: Dilworth v Stamp Commissioner [1899] AC 99."*

In *Attorney General (McGrath) v. Healy* [1972] IR 393, Justice Pringle quoted from the judgment in *Bolger v. Doherty* [1970] I.R. 233 in relation to the effect of the term "includes" when used in a statutory definition: *"No doubt there are cases where the word 'includes', as used in a definition section, has been held to be equivalent to 'means and includes'; but that is not its ordinary meaning. When a definition section in a statute provides that a word shall 'include' something, it implies usually that that something would be outside the ordinary meaning of the word and that it is necessary, therefore, to include it in the meaning of the word for the purpose of the statute.* " This passage makes it very clear to me that the word "includes", when used in a statutory definition, is ordinarily a word of expansion under Irish law. Further support for this view is found in *The People (Director of Public Prosecution) v. Cawley* [2003] 4 I.R. 321 which notes that in *Attorney General (McGrath) v. Healy* , it was held that "includes" is a word of expansion when used in a statutory definition. Relevant also is *Flynn v. Denieffe* [1989] I.R. 772 which refers to the fact that *"In Bolger v. Doherty ... the then President of the High Court held that the definition of lottery aforesaid and in particular the word 'includes' was designed to extend the definition to activities which would not fall within the ordinary meaning of that word but that this extended meaning did not exclude from the definition those lotteries which would fall within the ordinary sense of the word.* "

There is also an example of a similar interpretation clause in the Freedom of Information (FOI) Act 1997 which has been the subject of judgment recently in both the High Court and the Supreme Court. The definition of "personal information" in section 2 of the FOI Act has a similar structure to the definition of "public authority" in the Regulations:

"personal information" means information about an identifiable individual that-

(a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or

(b) is held by a public body on the understanding that it would be treated by it as confidential,

and, without prejudice to the generality of the foregoing, includes-

(i) information relating to ...

(ii) information relating to ...

(iii) information relating to ...

(iv) information relating to...

(v) information relating to ...

(vi) information relating to ...

(vii) a number, letter, symbol, word, mark or other thing assigned ...

(viii) information relating to the entitlements of ...

(ix) information required for the purpose of ...

(x) the name of the individual where it appears with ...

(xi) information relating to ... and

(xii) the views or opinions of another person about the individual ..."

In *The Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women the Information Commissioner* [2009] IEHC 315 McCarthy J. dealt specifically with the question of whether, in order to qualify as "personal information", it was necessary that information captured at any one of the twelve items listed at (i) - (xii) should firstly satisfy the requirement of falling into either category (a) or (b). The position previously adopted by the Information Commissioner had been that it was not sufficient that information be captured at any one of the twelve items listed at (i) - (xii) but that it must first of all be information captured by the wider categories at (a) or (b) which she regarded as being an "overarching" requirement. In this respect, the position previously taken by the Information Commissioner to this kind of interpretation clause is very similar to the position being advocated by NAMA in this present case. McCarthy J. found that the Information Commissioner was incorrect in taking this approach; in a finding, which was upheld recently (19 July 2011) in the Supreme Court, he noted at paragraph 42:

> *"I think that I might safely, and briefly, at this stage dispose of the proposition that if given information was to fall within the category of 'personal information', it would be necessary not merely that it should be one of the listed classes in the definition (at (i) to (x)) (sic) but also that it would 'satisfy' what the Commissioner has described as 'the overarching prior requirements', namely, those at subparas. (a) and (b) above. It seems to me that this is a fundamental misconception in terms of an interpretation of the Act. This is because what is described as the list is 'without prejudice to the generality of the foregoing'; the point is, accordingly, that personal information may well extend beyond the listed items but that, whatever else, such listed items are personal information. This type of provision is a commonplace in legal usage, if not on a more widespread basis."*

While McCarthy J. placed some emphasis on the phrase "*without prejudice to the generality of the foregoing* ", I nevertheless believe that his finding is consistent with the approach in the cases cited above and that it applies to the definition of "public authority" in this present decision. On this basis, it is sufficient in order to qualify as a "public authority" that a body or person be captured by any one of the items listed at (i) - (vii) and this is the case whether or not the body or person is captured also by the categories at sub-paragraphs (a), (b) or (c).

Returning to the rules cited above from Dodd's *Statutory Interpretation in Ireland* , I am satisfied that the ordinary (or literal) meaning of "includes" has an extensive or expansive connotation requiring that what is governed by "includes" is to be added in or included. Furthermore, I am satisfied that giving this meaning to "includes" results in the provision (the definition of "public authority") being entirely plain and unambiguous. On this basis, I am satisfied that in applying the Regulations effect should be given to the plain meaning of "includes".

The National Asset Management Agency has argued that allowing the word "includes" its ordinary meaning would have the consequence, in the present context, of extending the definition of public authority beyond what is envisaged in the EU Directive. What NAMA proposes is that the plain and ordinary meaning of the word, as used in the Regulations, be set aside in favour of a meaning which implies a restriction rather than an expansion or an inclusion. It is not at all clear that, as Commissioner for Environmental Information, I may abandon the plain language of the Regulations in favour of an interpretation which is arguably more in keeping with the provisions of the Directive. This is particularly the case where the language of the Regulations, in this particular instance, is neither obscure nor ambiguous.

In any case, I am not persuaded that reliance on the plain meaning of the word "includes", as used in the definition of "public authority" in the Regulations, gives rise to an outcome which is at odds with the Directive. In fact it is very arguable that the Directive encourages and enables Member States to take an expansive approach to what constitutes a "public authority". Recital (11) of the Directive refers expressly to an expansive intent in relation to the definition; and Recital (24) expressly permits Member States "*to maintain or introduce measures providing for broader access to information than required by this Directive.* " Therefore, I do not accept that subparagraphs (a) to (c) of the definition of "public authority" in the Regulations should be interpreted as restrictive criteria where a Member State has apparently chosen to take an expansive approach to the definition.

Ejusdem Generis Rule

Finally, NAMA argues that a rule known as *ejusdem generis* applies. In *Statutory Interpretation in Ireland,* Dodd describes the *ejusdem generis* rule as follows: "*Where a list or string of genus-describing terms are followed by wider residuary or sweeping-up words, the ordinary or wide meaning of the residuary words is presumed to be limited to things of that class or genus* ." Dodd explains, however, that the "*ejusdem generis canon is not a binding rule and will not be applied where there is some contrary indication* ." He refers to the Supreme Court judgment in *Royal Dublin Society, Applicant v. The Revenue Commissioners* [2000] I.R. 270 in which Keane J. took the view that all words should be given their "common meaning". Dodd also advises: "*Where general words are followed by particular instances, the generality is not normally cut down by the particular instances - ejusdem generis does not apply* ."

In this case, the plain and ordinary meaning of "includes" is expansive when used in a statutory definition. As used in the definition of "public authority" at Article 3(1) of the Regulations, it provides that, "whatever else", the listed entities are public authorities. For this reason alone, *ejusdem generis* does not apply. Moreover, I do not agree with NAMA that subparagraphs (a) to (c) in the definition of "public authority" describe a particular genus. On the contrary, the terms used are general and subject to varying interpretations, whereas the list of bodies provided at (i) to (vii), though wide ranging, is more specific in its terms. For instance, there is no ambiguity as what the phrase "*a board or other body . . . established by or under statute* " means. I find that that the *ejusdem generis* rule does not apply here.

Decision

In accordance with Article 12(5) of the Regulations, I have reviewed the decision of NAMA in this case. I find, for the reasons set out above, that NAMA was not justified in refusing the appellant's request on the ground that it is not a public authority within the meaning of the Regulations. I find that NAMA is in fact a public authority on the basis that it fits the criterion at item (vi) in the list of entities numbered (i) to (vii) which the definition of public authority "includes".

Having found that it is sufficient, for the purposes of meeting the definition of "public authority", that a body is captured by any one of the provisions set out at items (i) - (vii) within the definition, there is no necessity in this present case to consider whether NAMA is captured also by any of the categories (a), (b) or (c) as contained in the definition.

I hereby annul the decision of NAMA and find that it is a public authority under Article 3(1)(vi) of the Regulations. In the light of this decision, NAMA must now deal with the appellant's request as first made by him on 3 February 2010. It is open to the appellant, should he so chose, to narrow the range of information which he seeks.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Emily O'Reilly
Commissioner for Environmental Information

13 **September 2011**